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**BEFORE THE CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD**

In the Matter of

OLIN CORPORATION,

Petitioner,

CASE NO. _____

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF OLIN'S
PETITION FOR REVIEW; DECLARATION OF
MARTIN J. MCTIGUE IN SUPPORT
THEREOF

[Water Code § 13320; 22 C.C.R. § 2050, *et seq.*]

I. INTRODUCTION

The Regional Board cannot and should not require the supply of alternative water to replace well water that the State of California has determined to be safe to drink on a daily basis. Having done so, the Regional Board's action is inappropriate, improper and an abuse of discretion, and therefore must be modified, vacated or set aside.

A. SUMMARY OF PETITION AND REQUESTED RELIEF

Petitioner Olin Corporation ("Olin") seeks review of the Regional Water Quality Control Board's April 29, 2004 decision ("Decision") denying Olin's request to modify the Regional Board's October 18, 2002 Alternative Water Supply Order. [Declaration of Martin "Kelly" J. McTigue ("McTigue Decl."), Exh. A.]

Olin requests the State Board either: (1) vacate or set aside the Regional Board's April 29, 2004 Decision and direct the Regional Board to grant Olin's request to modify the

1 Regional Board's Alternative Water Supply Order to only require Olin to provide treatment or
2 alternative water to well owners and their tenants at wells exceeding the prevailing 6 ppb Action
3 Level and Public Health Goal ("PHG") for perchlorate; (2) vacate or set aside both the Regional
4 Board's Decision and Order as having been made without legal authority under Water Code
5 section 13267. Alternatively, Olin requests the State Board directly grant Olin's request and
6 modify the Alternative Water Supply Order to conform to the existing 6 ppb Action Level and
7 PHG. Absent the State Board's issuance of the requested relief, Olin will suffer ongoing
8 significant harm as the Regional Board has required Olin to continue to provide bottled water at
9 the outdated and superseded 4 ppb Action Level to 311 more wells than would be required at the
10 applicable 6 ppb Action Level at an annualized additional cost of \$424,000.

11 The Regional Board's April 29, 2004 Decision denying Olin's request to modify the
12 Alternative Water Supply Order to conform to the prevailing perchlorate 6 ppb Action Level and
13 PHG is inappropriate and improper, raising substantial and precedential issues of statewide
14 importance appropriate for State Board review and action. The Regional Board's action is
15 inappropriate, improper and an abuse of its discretion for the following reasons:

16 ■ In issuing its April 29, 2004 Decision, the Regional Board acted without a reasonable
17 factual basis and without sufficient or substantial evidence. The Regional Board's Alternative
18 Water Supply Order required Olin to provide replacement water solely when perchlorate
19 concentrations in well water exceeded the prevailing Action Level, the level determined and held
20 by the Regional Board as the basis for its Order to provide a health protective drinking water
21 standard "*considered safe to people ingesting that water on a daily basis.*" [McTigue Decl., Exh.
22 C.]

23 When the Department of Health Services ("DHS") duly revised the perchlorate Action
24 Level from 4 ppb to 6 ppb on March 12, 2004 to conform to the newly-issued Office of
25 Environmental Health Hazard Assessment ("OEHHA") PHG, the Regional Board was also
26 required to conform its Alternative Water Supply Order to the prevailing 6 ppb Action Level;
27 there existing no other factual basis or evidence to support maintaining the outdated and
28 superseded 4 ppb Action Level for reasons of public health.

1 ■ In issuing its April 29, 2004 Decision, the Regional Board substituted its subjective and
2 unsupported judgment for the State of California's determination of the safe level of perchlorate
3 concentrations in drinking water as reflected in California's PHG and revised Action Level. The
4 Regional Board provided no reasonable factual basis or substantial evidence for rejecting
5 California's PHG and Action Level determination.

6 ■ In issuing its April 29, 2004 Decision, the Regional Board acted without jurisdictional
7 authority under Water Code section 13267 to re-affirm its Alternative Water Supply Order and to
8 require Olin to continue to provide replacement water for well water with concentrations of
9 perchlorate at or below the prevailing Action Level and PHG of 6 ppb. Absent issuance of a
10 cleanup and abatement order based on and in full compliance with Water Code section 13304, the
11 Regional Board failed to proceed as required by law.

12 **B. STANDARD OF REVIEW**

13 In reviewing the Regional Board's April 29, 2004 Decision, the State Board is charged
14 with exercising its independent judgment as to whether the Regional Board provided a reasonable
15 factual basis and substantial or sufficient evidence to support its action. The State Board has
16 equated this standard of review to that used by a reviewing court under California Code of Civil
17 Procedure section 1094.5. *Exxon Company, USA*, SWRCB Order No. 85-7, 1985 WL 20026
18 (August 22, 1985); *Stinnes-Western Chemical Corp.*, SWRCB Order No. WQ 86-16, 1986 Cal.
19 ENV LEXIS 18 (Sept. 18, 1986); *Bank of America v. State Water Resources Control Board*, 42
20 Cal. App. 3d 198, 208 (1974). California Code of Civil Procedure section 1094.5 provides that:
21 "Abuse of discretion is established if the [agency] has not proceeded in the manner required by
22 law, the order or decision is not supported by the findings, or the findings are not supported by
23 evidence." To allow for the State Board to conduct its requisite review, the Regional Board is
24 required to provide in its decision the supporting evidence and findings "to bridge the analytical
25 gap between the raw evidence and ultimate decision." *Exxon Co., supra*; *Topanga Assn. For A*
26 *Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506 (1974).

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1 **II. STATE BOARD REVIEW OF THIS PETITION IS APPROPRIATE AND**
2 **NECESSARY**

3 Olin's petition is, to its knowledge, the first filed before the State Board to review a
4 Regional Board's decision requiring a responsible party such as Olin to provide an alternative
5 water supply pursuant to Water Code section 13267 and to provide this alternative water to well
6 owners when their well water is at or below the exclusively health-based PHG and Action Level
7 established by OEHHA and DHS. Consequently, the Regional Board's action here is of
8 precedential importance throughout California and to other regional boards supervising many like
9 perchlorate groundwater cases.

10 The presence of perchlorate is a statewide concern. Issues concerning regional board
11 oversight and management of perchlorate groundwater investigations as well as the appropriate
12 authority, circumstances and criteria under and by which a regional board may require
13 responsible parties to provide an interim alternative water supply prior to cleanup require the
14 highest level of review. Such review as can only be provided by this State Board in the interests
15 of fairness, not only to Olin but to the many other affected parties at comparable sites across the
16 State. As reported by the California Senate Office of Research ("SOR Report," McTigue Decl.,
17 Exh. L.) in January 2004 (prior to California's March 12, 2004 issuance of the final PHG and
18 corresponding revision in the DHS Action Level from 4 ppb to 6 ppb), perchlorate groundwater
19 contamination is a significant statewide problem of concern. As stated in the SOR Report:

20 *The majority of the state's Regional Water Quality Control Boards*
21 *[including the Central Coast, Central Valley, Colorado River*
22 *Basin, Los Angeles Region, San Diego, San Francisco Bay and*
23 *Santa Ana Regions] face perchlorate contamination in their regions*
 in excess of the actionable level [of 4 ppb at the time of the SOR
 Report; subsequently revised to 6 ppb as both the PHG and Action
 Level].

24 Arbitrary, unsupported and piecemeal setting of conflicting and changing alternative water
25 supply requirements, standards and criteria, as with groundwater cleanup standards, would be
26 imprudent, unwise and work a significant disservice to all affected parties as well as the public
27 under the above circumstances. [See, e.g., SWRCB Res. No. 92-49, Section III A.9, requiring
28 regional boards, in oversight of cleanups, to "prescribe cleanup levels which are consistent with

appropriate levels for analogous discharges that involve similar wastes, site characteristics, and water quality considerations.”]

The issues raised by Olin’s Petition are substantial and within the peculiar knowledge and expertise of the State Board as they are of statewide importance and first impression in the regulation of water quality. The State Board’s consideration of those issues will represent a prudent allocation of time and resources by providing precedent for the numerous other like matters being faced by affected parties and being considered by regional boards throughout the State. *The People ex rel. Cal. Regional Water Quality Control Board vs. Barry*, 194 Cal. App. 3d 158 (Aug. 1987). The State Board review of Olin’s petition can and will only serve justice and the public interest in ensuring safety of the State’s water supplies by providing certainty, consistency, clarity and fairness to all affected parties.

III. THE REGIONAL BOARD’S REFUSAL TO MODIFY ITS ALTERNATE WATER SUPPLY ORDER WAS INAPPROPRIATE AND IMPROPER

A. THE REGIONAL BOARD ORDER ADOPTED THE PERCHLORATE ACTION LEVEL AS THE THRESHOLD AT WHICH ALTERNATE WATER MUST BE SUPPLIED

In its Alternative Water Supply Order issued pursuant to Water Code section 13267, the Regional Board required, in addition to further monitoring, that: “If perchlorate is detected in any of the wells, Olin will provide treatment or an alternative water supply [e.g., bottled water] to the well owners and/or their tenants.” The Regional Board imposed this water replacement requirement on Olin based on its review of offsite domestic well sampling results which showed that some of the domestic wells:

... contain perchlorate concentrations exceeding the 4 ug/l [i.e., 4 ppb] action level established by the California Department of Health Services. An action level is the level of contaminant in drinking water that is considered safe to people ingesting that water on a daily basis.¹

¹ California Action Levels are health-based advisory levels established by DHS for chemicals in drinking water that lack MCLs. There are presently no state or federal MCLs established for perchlorate. When a chemical such as perchlorate, which DHS designates an unregulated chemical requiring monitoring (“UCRM”), exceeds the Action Level, DHS requires drinking water providers to monitor and notify drinking water users. [Cal. Health & Safety Code §§ 116450, 116455; 22 C.C.R. 64450.] DHS recommends that the drinking water system take the well out of service if the chemical exceeds ten times (10x) the Action Level.

1 The Regional Board stated its concerns that "perchlorate concentrations exceeding the action
2 level in some wells" could affect human health by interfering with iodide uptake into the thyroid
3 gland disrupting how the thyroid gland functions in adults as well as sensitive populations
4 including infants and expectant mothers and their fetuses.

5 In discussions with the Regional Board, Olin immediately sought clarification that its
6 "*criterion for providing treatment or an alternative water supply*" was the prevailing DHS Action
7 Level, not a detection or other purely numerical level. After the Regional Board confirmed this
8 fact, Olin confirmed in writing on October 22, 2002 the Regional Board's intention by the
9 Alternative Water Supply Order that Olin was only required to provide alternative water "[i]f
10 *perchlorate is detected above the 4 ppb Action Level...*" [McTigue Decl., Exh. D (emphasis
11 added).] Thus, it is clear that the Regional Board based its Alternative Water Supply Order
12 exclusively on the prevailing Action Level, which the Regional Board concluded was protective
13 of human health.

14 In addition, the Regional Board's actions subsequent to establishment of the perchlorate
15 PHG and Action Level at 6 ppb further corroborate that the Regional Board intended the
16 governing standard for Olin to supply replacement water under the Alternative Water Supply
17 Order to be the prevailing Action Level, not a numerical 4 ppb concentration level. In late 2003,
18 the Regional Board requested that Olin prepare a long term alternative water supply evaluation
19 study ("Alternative Water Supply Report") analyzing the technical and economic feasibility of
20 providing treatment or alternative water for wells with perchlorate contamination levels in a range
21 from greater than 4 ppb (the then existing Action Level) to greater than 40 ppb. Subsequent to

22 California PHGs, established by OEHHA through a rigorous formal regulatory process based exclusively on
23 public health consideration (including for sensitive populations) regardless of cost, are concentrations of
24 drinking water contaminants that pose no significant health risk or are not anticipated to cause or contribute to
adverse health effects. [Cal. Health & Safety Code § 116365(c).]

25 Once OEHHA establishes a PHG for a chemical contaminant, DHS undertakes its own rigorous formal
26 regulatory process to establish the MCL. MCLs are enforceable drinking water standards which must be met
27 by public water systems. DHS must establish a contaminant's MCL at a level as close as is technically and
28 economically feasible to its PHG, placing primary emphasis on the protection of public health. [Cal. Health &
Safety Code § 116365(a).] Once set by DHS, the MCL replaces the Action Level and becomes the legally
controlling drinking water standard. DHS expects to issue the requisite perchlorate MCL within the next 12
months.

1 and based on the issuance of OEHHHA's 6 ppb PHG and DHS's 6 ppb Action Level on March 12,
2 2004, and following submittal of initial Olin drafts of its Alternative Water Supply Report, which
3 included a discussion of the 4 ppb alternative, the Regional Board on March 16, 2004, directed
4 Olin to delete and omit any discussion or consideration of providing an alternative water supply
5 for wells exceeding 4 ppb. The Regional Board directed Olin to begin its alternatives analysis at
6 the 6 ppb Action Level and PHG standard, followed by higher level alternatives. In its March 16,
7 2004 letter, the Regional Board directed:

8 *As you are aware, the Office of the Environmental Health Hazard*
9 *Assessment recently issued a Public Health Goal (PHG) for*
10 *perchlorate in drinking water. The drinking water PHG was set at*
11 *6 parts per billion (ppb). Now that the PHG has been determined,*
12 *we request that the focus of the Alternative Water Supply*
13 *Evaluation Report's (Report) analysis be modified to reflect the*
14 *PHG ... We request that you provide greater detail beginning with*
15 *perchlorate concentration of 6 ppb.*

16 [McTigue Decl., Exh. F (emphasis added).] Subsequent to receipt of this letter, Olin confirmed
17 with the Regional Board that it was to delete any discussion of the 4 ppb alternative and begin its
18 analysis at the 6ppb level. On April 16, 2004, Olin submitted the requested Alternative Water
19 Supply Report which began its analysis at the 6 ppb alternative. [McTigue Decl., Exh. G.] The
20 Regional Board's direction to Olin to eliminate from consideration the alternative of providing
21 replacement water at the 4 ppb standard based on the newly-issued 6 ppb PHG and
22 correspondingly revised Action Level corroborates that the Regional Board intended the
23 prevailing PHG/Action Level to govern as the Alternative Water Supply Order standard. When
24 the Action Level standard changed, the Regional Board's requirements were to change
25 accordingly.

26 Moreover, since implementation of Olin's investigation in early 2001, the Regional
27 Board's actions in managing and making decisions governing the various Site and off-Site
28 investigative phases into the nature and extent of the perchlorate contamination, also have been
based on the prevailing DHS action level and have been modified accordingly as that level
changed. These Regional Board actions include, but are not limited to, the Regional Board's

1 establishment of a soil screening level for soil remediation, and its issuance of on-Site and off-
2 Site groundwater Monitoring and Reporting Programs as well as required on-Site treated
3 groundwater discharge requirements. Such Regional Board actions further support and
4 corroborate that the Regional Board intended the standard for requiring Olin to provide
5 replacement water to be the prevailing Action Level, and that if the Action Level changed, the
6 standard for alternative or replacement water was intended to and required to change as well.²

7 **B. THE ALTERNATE WATER SUPPLY ORDER SHOULD BE REVISED TO**
8 **CONFORM TO THE NEW PERCHLORATE ACTION LEVEL**

9 Having based the Alternative Water Supply Order standard solely on the prevailing
10 Action Level, the Regional Board was required to conform that standard to the new Action Level
11 and PHG when revised from 4 ppb to 6 ppb. The Regional Board has no reasonable factual basis
12 not to do so. The basis for and supporting finding and determination of the Regional Board's
13 Alternative Water Supply Order was the protection of human health as it related to drinking
14 water. The revised Action Level and PHG of 6 ppb is fully protective of human health, and in
15 fact, OEHHA concludes that drinking water is acceptable for public consumption even if it
16 contains perchlorate at levels exceeding the PHG. [McTigue Decl., Exh. H] There is no
17 reasonable factual basis or any evidence supporting the Regional Board's substitution of its
18 judgment for that of the State of California's as to the safe level of perchlorate in drinking water.
19 On the subject of health protective drinking water standards, deferential judgment is due
20 California's authoritative OEHHA and DHS PHG and Action Level decisions. *See, e.g., Paredes*
21 *v. County of Fresno*, 249 Cal. App. 3d 1, 10-11 (1988) ("[t]he legislature has assigned the DHS
22 the duty to set standards regarding unhealthy levels of contaminants in drinking water. Local
23 decisions on the same subject, varying from county to county, cannot be justified.")

24 On March 12, 2004, after years of rigorous effort and scientific study, OEHHA issued its
25 perchlorate PHG at 6 ppb and DHS immediately revised its Action Level to conform. A PHG is
26

27 ² If Olin's request for a hearing and/or leave to present supplemental evidence is granted, Olin will provide
28 more detailed testimony documenting its above contentions.

1 the most conservative and health-protective drinking water goal, the underlying scientific basis
2 for, and first step to setting, the final MCL. As explained in OEHHA's PHG Guidance:

3 PHG represents a health-protective level for a contaminant that
4 DHS and California's public water systems should strive to achieve
5 if it is feasible to do so. However, a PHG is not a boundary line
6 between a "safe" and "dangerous" level of contaminant, and
7 *"drinking water can still be considered acceptable for public
consumption even if it contains contaminants at levels exceeding
the PHG."*

8 [McTigue Decl., Exh. H (emphasis added)] By law, the PHG is based exclusively on public
9 health considerations without regard to cost impacts and according to strict and conservative risk
10 assessment guidelines. [Cal. Health & Safety Code §§ 116293, 116365]. These statutory
11 guidelines provide, in relevant part, that:

- 12 1. PHGs for acutely toxic substances shall be set at levels at which
13 no known or anticipated adverse effects on health will occur,
14 with an adequate margin of safety.

15 * * *

- 16 3. To the extent the information is available, OEHHA shall
17 consider possible synergistic effects resulting from exposure to
18 two or more contaminants.
- 19 4. OEHHA shall consider the existence of groups in the population
20 that are more susceptible to adverse effects of the contaminants
21 than a normal healthy adult.
- 22 5. OEHHA shall consider the contaminant exposure and body
23 burden levels that alter physiological function or structure in a
24 manner that may significantly increase the risk of illness.
- 25 6. In cases of insufficient data to determine a level of no
26 anticipated risk, OEHHA shall set the PHG at a level that is
27 protective of public health with an adequate margin of safety.

28 * * *

9. OEHHA shall consider exposure to contaminants in media other
than drinking water, including food and air and the resulting
body burden."

[McTigue Decl., Exh. H.]

1 The PHG is, in fact, more health-protective than the enforceable MCL which is derived
2 from it. This is because PHGs are "based solely on scientific and public health considerations
3 without regard to economic cost considerations", whereas "drinking water standards [i.e., MCLs]
4 are to consider economic factors and technical feasibility." [McTigue Decl., Exh. H.] The fact
5 that a PHG is the most health-protective of drinking water standards is also reflected in the
6 statutory requirement that, even though an MCL includes technical and cost considerations, the
7 MCL must be set "at a level that is as close as feasible to the corresponding public health goal
8 placing primary emphasis on the protection of public health."

9 Given the above, the revised Action Level conformed to the new PHG, fully satisfied the
10 stated goal of the Regional Board's Alternative Water Supply Order, to provide replacement
11 water "considered safe to people ingesting that water on a daily basis." Moreover, the prevailing
12 Action Level and PHG addressed and accounted for each of the Regional Board's stated, specific
13 health concerns forming the basis for its Alternative Water Supply Order including sensitive
14 populations, as well as further incorporating a ten-fold safety margin. As stated by OEHHA
15 Director Denton in publishing the perchlorate PHG:

16 The [PHG] support document estimates the level of the chemical in
17 drinking water that would pose no significant health risk to
18 individuals, *including sensitive populations*, consuming the water
19 on a daily basis over a lifetime. PHGs represent health protective
goals based solely on public health conditions and are developed
based on the best available data in the scientific literature.

20 [McTigue Decl., Exh. I (emphasis added).] The PHG Report itself considered and addressed the
21 following sensitive populations, some of which the Regional Board cited as of concern in its
22 Alternative Water Supply Order:

23 (i) pregnant women and their fetuses, especially those who are
24 getting less than a sufficient amount of iodine;

25 (ii) lactating women, especially those who are getting less than a
26 sufficient amount of iodine;

27 (iii) infants; and,

28 (iv) individuals with thyroid problems.

1 [McTigue Decl., Exh. I.]

2 The Regional Board's failure to conform its replacement water standard to the PHG and
3 Action Level under the above circumstances is an abuse of discretion. The Regional Board did
4 not and cannot provide any reasonable factual basis or any substantial or sufficient to support
5 maintaining the old 4 ppb Action Level. The existing record only supports conforming the
6 Regional Board's replacement water standard to 6 ppb, the presently existing Action Level and
7 PHG which are California's existing standards.

8 **C. THE REGIONAL BOARD'S REFUSAL TO MODIFY ITS OCTOBER 2002**
9 **DECISION CANNOT BE SUPPORTED BY THE EVIDENCE**

10 **1. The Regional Board Refused to Consider the Determinations of DHS**
11 **and OEHHA of Safe Levels of Perchlorate in Drinking Water**

12 The Regional Board is generally recognized to have expertise in matters involving water
13 resources and water quality, including groundwater cleanup levels. [See *Stinnes-Western*
14 *Chemical, supra.*] However, California's OEHHA and DHS are recognized as the statutorily
15 designated authorities for assessing the risks of chemical exposures and in establishing
16 enforceable drinking water standards. [Cal. Health & Safety Code §§ 116325, 116350, 116293.]
17 Thus, whereas here, the issue is not what should a cleanup level be, but what level of perchlorate
18 is "safe" in drinking water so as to require replacement water above that level, the Regional
19 Board must defer to OEHHA's and DHS' authority. The Regional Board has not done so. The
20 Regional Board provided no basis for substituting its subjective and unsupported judgment for
21 OEHHA's and DHS's determination, as reflected in the PHG and Action Level for "safe" levels
22 of perchlorate in drinking water. California's determination of the PHG and Action Level must
23 prevail.

24 **2. The Regional Board's Refusal to Conform to the New Action Level**
25 **was Based on the Same Facts and Findings Relied Upon in 2002**

26 The Regional Board's April 29, 2004 Decision required Olin to "continue to supply
27 interim alternative water to affected well owners with perchlorate concentrations above 4 ppb, as
28 directed in our October 18, 2002 letter." [McTigue Decl., Exh. A (emphasis added).] In its
April 29, 2004 Decision, the Regional Board did not provide any new evidence or factual findings

1 for continuing (or alternatively, imposing anew) the outdated 4 ppb Action Level for Olin to
2 supply replacement water despite the change in the prevailing Action Level to 6 ppb. The
3 Regional Board merely re-affirmed its earlier Order relying on the Order's original factual basis
4 and findings.

5 **3. The "Factors" Referred by the Regional Board in Affirming Its**
6 **October 2002 Order Do Not Support Its Rejection of the New**
Perchlorate Action Level and PHG

7 Although the Regional Board did not provide any new or independent factual basis for
8 refusing to modify its Alternative Water Supply Order to conform to the new Action Level, it did
9 attempt to explain it away by noting, "*several factors that warrant consideration before raising*
10 *the replacement water level to 6 ppb.*" These factors were as follows: (1) the Regional Board's
11 authority under Water Code section 13304 and State Board Resolution No. 92-49 to consider
12 background water quality levels in setting cleanup standards in cleanup and abatement orders; (2)
13 the Regional Board's newly-provided authority by recent amendments to Water Code section
14 13304 to require replacement water as part of a cleanup and abatement order; and (3) the potential
15 for well sampling analytical errors and seasonal fluctuations.

16 However, these "factors" are irrelevant and insufficient to provide an independent or new
17 factual or legal basis to support the Regional Board Decision. The Regional Board's Alternative
18 Water Supply Order was issued pursuant to Water Code section 13267, not Section 13304. The
19 Regional Board did not premise or base the subject Decision and Order on either a cleanup and
20 abatement order or the designation of a formal containment zone. Water Code section 13304 and
21 State Board Resolution No. 92-49 ("Policies and Procedures for Investigations And Cleanup and
22 Abatement of Discharges Under Water Code section 13304") and its formal containment zone
23 policy are not implicated or at issue here. Those formal cleanup and abatement authorities and
24 policies provide a detailed regulatory fabric requiring express consideration of specific policies,
25 factors and evidence, none of which were considered by the Regional Board. Moreover, even
26 were Water Code section 13304 and cleanup and abatement policies promulgated thereunder to
27 apply: (1) there is no reasonable factual basis or legal authority to require Olin to replace well
28 water already determined to be safe by the State of California's Action Level and PHG; and

1 (2) Olin's requested relief does not contravene Water Code section 13304 and State Board
2 cleanup and abatement policies and is consistent with the Central Coast Basin Plan and its water
3 quality objectives.

4 In addition, well sampling and analytical factors and possible variables such as seasonal
5 fluctuations and sampling error rates have no bearing on or relevance to the actual alternative
6 water supply standard or level itself. The actual compliance standard must be set at a finite point
7 for certainty. This is a decidedly and distinctly separate issue from the reliability of the scientific
8 sampling methods used to determine whether the compliance standard has been met to a
9 reasonable degree of scientific certainty. Such was as true at the time of the Regional Board's
10 original Alternative Water Supply Order when the Action Level was 4 ppb as it is now with the
11 revised 6 ppb Action Level standard. Moreover, the PHG and thus the Action Level have a
12 tenfold safety factor which will necessarily protect against any of the variables suggested by the
13 Regional Board.

14 It is clear that the Regional Board's "factors warranting consideration" do not provide any
15 new or additional factual or legal basis for its Decision and underlying Order. The Regional
16 Board premised its April 29, 2004 Decision solely on the underpinnings of its prior Alternative
17 Water Supply Order. Inasmuch as California has changed the perchlorate Action Level, the
18 Regional Board's facts and findings supporting its original Order no longer serve to support its
19 April 29, 2004 Decision.

20 **D. OLIN'S REQUESTED RELIEF IS CONSISTENT WITH THE BASIN PLAN AND**
21 **ITS WATER QUALITY OBJECTIVES**

22 Requiring replacement water only when well water perchlorate concentrations exceed the
23 prevailing Action Level and PHG is also consistent with the Basin Plan and its water quality
24 objectives. Water Quality objectives for groundwater in the Basin Plan include: (1) the narrative
25 "Taste and Odors" objective to protect drinking water ("... shall not contain taste or odor-
26 producing substances in concentrations that adversely affect beneficial uses"); (2) the State
27 drinking water standards, i.e., maximum contaminant levels (MCLs) ("... shall not contain
28 concentrations of chemical constituents in excess of [MCLs]"); and, (3) the narrative and

1 quantitative agricultural supply objective (“... shall not contain concentrations of chemical
2 constituents in amounts which adversely affect agricultural beneficial use” with “interpretation of
3 adverse effects [to be] derived from the University of California Agricultural Extension Service
4 guidelines provided in Table 3-3 and quantitative concentrations for those chemicals listed in
5 Table 3-4 in waters used for irrigation and livestock not to be exceeded.”). [Basin Plan, Ch. 3,
6 Section II.A.4.] Olin’s request is also consistent with the Basin Plan’s general direction that
7 “[w]astes discharged to groundwaters shall be free of toxic substances in excess of accepted
8 drinking water standards; taste, odor, or color providing substances...” (emphasis added).
9 [Basin Plan, Ch. IV, §IV.D., “Groundwaters.”]

10 Perchlorate is odorless, tasteless and colorless and, thus, its presence in the subject aquifer
11 does not implicate the narrative taste and odors water quality objective here. Moreover, at
12 present, perchlorate is an unregulated chemical (with no MCL in place). Perchlorate is neither
13 listed in Basin Plan Tables 3-4 and 3-5 for potential adverse agricultural effects nor listed in
14 Basin Plan Table 3-2 setting forth existing enforceable MCLs implicating the domestic and
15 municipal water supply beneficial use. Once DHS issues a final MCL, the Basin Plan will
16 incorporate that quantitative MCL water quality objective and be explicitly applicable to the
17 subject Olin aquifer. Consequently, it can be said here that requiring replacement water only
18 when wells exceed the prevailing perchlorate Action Level and PHG is fully consistent with the
19 Basin Plan and supportive of providing safe drinking water, the underlying beneficial use of most
20 importance in cleanups. In fact, the PHG is most protective of all the regulatory and accepted
21 drinking water standards including MCLs.

22 In conclusion, the Regional Board’s April 29, 2004 decision refusing to conform its
23 Alternative Water Supply Order to the new Action Level and PHG is not supported by any
24 reasonable factual basis. Absent a reasonable factual basis and substantial evidence supporting
25 that action, the Regional Board’s April 29, 2004 Decision must be vacated and the Alternative
26 Water Supply Order conformed to the prevailing 6 ppb Action Level and PHG.

1 **IV. THE REGIONAL BOARD LACKED AUTHORITY TO ISSUE ITS APRIL**
2 **29, 2004 DECISION**

3 The Regional Board issued its Alternative Water Supply Order pursuant to Water Code
4 section 13267. Water Code section 13267 provides regional boards authority only to require a
5 responsible party to investigate and submit investigative reports. [See State Board Water Quality
6 Enforcement Policy, IV.C.3.] The Regional Board's Order does not cite or reference Water Code
7 section 13304, purport to be a cleanup and abatement order pursuant to that Section or provide the
8 requisite facts, findings and decision for such an order. Its subsequent April 29, 2004 Decision
9 denying Olin's request to conform that Order to the prevailing perchlorate 6 ppb Action Level
10 required Olin to continue to provide replacement water at the prior and now superseded 4 ppb
11 Action Level standard "as directed" in the prior Alternative Water Supply Order. The Regional
12 Board generally discusses Water Code section 13304 and State Board Resolution No. 92-49
13 ("Policies and Procedures For Investigation and Cleanup and Abatement Order of Discharges
14 Under Water Code section 13304") as "factors warranting further consideration before raising the
15 replacement water level to 6 ppb" in its April 29, 2004 Decision. However, the Regional Board
16 does not provide any evidence, make any formal findings or issue any formal decision or order
17 under Water Code section 13304 based on those factors applicable to its Decision or this case.
18 Nor does the Decision reflect that the State Board followed any of the requisite procedures,
19 considered any of the requisite policies and factors, or made any of the requisite determinations
20 for issuing a cleanup and abatement order as set forth in State Board Resolution No. 92-49.

21 Moreover, although Water Code section 13304 was recently amended to provide regional
22 boards the express authority to require replacement water as part of a cleanup and abatement
23 order (though subject to specialized protections and procedures, not provided here), Water Code
24 section 13267 was not so amended. Thus, the Regional Board has no legal authority under Water
25 Code section 13267 to require replacement water.

26 In conclusion, the Regional Board's Decision and Order are exclusively premised and
27 issued under Water Code section 13267, not Water Code section 13304. The Regional Board
28 lacks jurisdictional authority to require Olin to supply alternative water under that statutory

1 section. Consequently, Olin requests the State Board vacate the Regional Board's April 29, 2004
2 Decision and Alternative Water Supply Order accordingly.

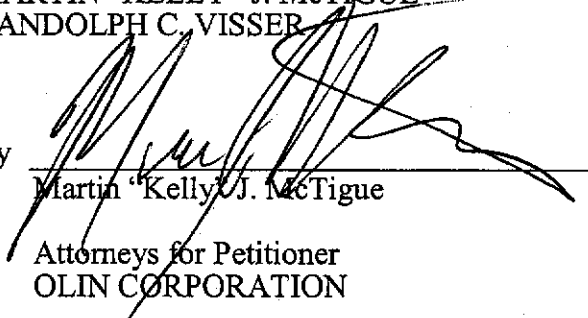
3 **V. CONCLUSION**

4 In conclusion, Olin respectfully requests the State Board to direct the Regional Board to:
5 (1) vacate the Regional Board's April 29, 2004 Decision and grant Olin's April 7, 2004 request
6 and modify its Alternative Water Supply Order to conform to the 6 ppb perchlorate Action Level
7 and PHG; or (2) vacate both its April 29, 2004 Decision and Alternative Water Supply Order.
8 Alternatively, Olin requests the State Board to take such actions directly.

9 Dated: May 27 2004

Respectfully submitted,

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